Forensic DNA testing:
legal background to Bill C-104

Background Paper

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INTRODUCTION

Forensic DNA typing, which attempts to match biological samples of suspects with biological specimens left at the scene of the crime, has recently become a powerful investigative tool for police. Since 1988, trial judges in Canada have allowed the introduction of forensic DNA evidence in criminal proceedings on the basis that such evidence would be both relevant and helpful to the trier of fact, namely the jury. In most cases, the main issue in dispute was not the validity of this novel scientific technique, but rather was whether a bodily sample taken by the police without the accused's consent amounted to an unreasonable seizure within the meaning of section 8 of the Charter. Illegally obtained evidence can be excluded on the basis of section 24(2) of the Charter, if its admission would bring the administration of justice into disrepute. Prior to the introduction of Bill C-104, there was no legislation in place to authorize the police to take blood, hair or buccal samples, from either an accused person or a convicted offender, for the purposes of DNA genotyping.

Despite this legislative void, appellate courts in British Columbia and New Brunswick upheld trial judges' rulings that the DNA evidence be admitted in cases where the sample had been collected clearly in breach of the accused's Charter rights (*R.* v. *Baptiste*,[1] *R.* v. *Légère*,[2] *R.* v. *Paul*[3] and *R.* v. *Stillman*[4]). In essence, the courts concluded that the admission of the evidence flowing from the illegal seizures would not bring the administration of justice into disrepute. In other words, the admission of the DNA evidence would not result

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(1) (1994), 88 C.C.C. (3d) 211 (B.C.C.A.).

(2) (1994) 35 C.R. (4th) 1 (N.B.C.A.).

(3) Unreported, file no. 205/90/CA, 12 December 1994 (N.B.C.A.).

(4) Unreported, file no. 117/93/CA, 27 February 1995 (N.B.C.A.).

in an unfair trial for the accused. Crucial factors the courts considered in making their assessment were the seriousness of the Charter breach, the gravity of the criminal charge, the conduct of the police, and the availability of other lawful investigative techniques. Without explicit legislative authority, it was becoming increasingly apparent, however, that the grounds upon which the police could justify demands for DNA samples from an accused were quite precarious.

A ruling by the Supreme Court of Canada in the fall of 1994 created the impetus for legislative action to be taken. In *R.* v. *Borden*,[5] the Supreme Court of Canada ruled that improperly obtained DNA evidence should be excluded, since the blood sample had been obtained from the accused without his valid and informed consent. Although the accused had acquiesced in the police demand to provide a blood sample for DNA typing in relation to a specific charge of sexual assault, the police had not informed him that they intended to use the sample in the investigation of another unsolved sexual assault. Even though the DNA analysis results identified the accused as the assailant in that previous rape, the Supreme Court agreed with the Nova Scotia Court of Appeal that the evidence was inadmissible. The Supreme Court in the *Borden* case noted that there was no legal obligation upon the accused to provide a blood sample, nor was there any lawful means by which the police could obtain one without his consent. In fact, the Court emphasized that there was no statutory authority by which the police could obtain a warrant to seize a bodily substance from an accused for the purposes of DNA testing. Defence counsel could properly advise their clients not to submit to DNA testing voluntarily and any police action to seize bodily samples without consent would be considered illegal. Hence, police forces ran the risk that any evidence collected would be subsequently discarded by a court in its analysis under section 24(2) of the Charter.[6]

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(5) [1994] 3 S.C.R. 145.

(6) Although courts are required to apply the same criteria in determining whether evidence should be excluded under section 24(2) of the Charter, they do not all arrive at the same conclusion. It should be noted that all the decisions penned by the New Brunswick Court of Appeal upholding the admissibility of the illegally obtained DNA evidence were released after the Supreme Court of Canada ruled in *Borden* on 30 September 1994; the *Légère* case was released on 16 December 1994, the *Paul* decision was issued on 12 December 1994, *R.* v. *Stillman* was released on 27 February 1995. It is clear, therefore, that a court would need to assess the particular facts of a case in order to determine whether the illegally obtained evidence should be excluded: such an assessment requires the balancing of the rights of the accused against societal interests.

Bill C-104 addresses the issue by providing a legislative scheme whereby the police may obtain warrants to obtain bodily specimens for the purposes of DNA testing. Bill C-104 appears to strike a fair balance between an individual's right to privacy and the state's interest in identifying offenders. That does not mean, however, that the debate is finally settled; the Supreme Court of Canada in *Borden* did warn that such a legislative scheme might raise Charter concerns.

LEGISLATIVE HISTORY OF BILL C-104

With the unanimous consent of all political parties, Bill C-104 was passed by the House of Commons on 22 June 1995. Upon tabling the bill, the Minister of Justice indicated it was the introductory component of a more comprehensive scheme; in the fall of 1995 the Minister intends to introduce a second bill to govern the banking of DNA profiles collected during the course of criminal investigations.

Consideration of Bill C-104 in the Senate, although not as swift as in the House of Commons, was also expedited. After its second reading in the Senate on 27 June, the bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs, which held two public meetings on the matter. Most of the witnesses who appeared before the Committee endorsed the bill in principle, as did all those who submitted briefs. Nonetheless, some were critical of certain components of the bill. The most frequent criticisms were:

i) that the list of offences for which a DNA warrant could be sought was overly broad,

ii) that the hearing for the warrant would be conducted without the presence of the accused,

iii) that there was no provision for using, in most circumstances, the least intrusive method of obtaining a DNA sample;

iv) that there was no provision for the long-term banking of DNA samples collected, and

v) that adults, unlike young offenders, did not have the right to have counsel present when the DNA sample was taken.

The Standing Committee referred the bill back to the Senate without amendment on 11 July, but recommended that the Minister of Justice consider extending to adult offenders the right to have counsel present when the DNA sample is collected. Bill C-104 received Royal Assent and was proclaimed into force on 13 July 1995.

In early August, the media reported that the RCMP detachment in Richmond, British Columbia, had been the first police force in Canada to rely on Bill C-104 to obtain a blood sample from an accused who had been previously charged with second-degree murder. The lawyer for the accused has indicated that he will challenge the new law on the grounds that the procedure violates his client's Charter rights. Defence counsel will likely argue that the procedure amounts to an unreasonable search and seizure in contravention of section 8 of the Charter, or that the procedure violates the accused's right to security of the person as guaranteed by section 7 of the Charter.

CRITERIA FOR OBTAINING A WARRANT

Under the new law, a provincial court judge will be able to issue a warrant authorizing a peace officer to seize a bodily substance from a person so that a forensic DNA analysis can be made. Police will thus be authorized to pluck individual hairs, take a mouth swab, or collect blood droplets from a suspect. The provincial court judge will conduct this hearing *ex parte*; in other words, only the party seeking the warrant (namely the police) will be present to make submissions. Certain elements must be established before a warrant can be issued. An application for a warrant must be accompanied by a sworn statement showing that the police have reasonable grounds to believe:

a) that one of the offences listed in the bill has been committed,

b) that a bodily substance has been found at the scene of the crime, on the body or clothing of the victim,

c) that the person against whom the warrant is to be executed was a party to the offence, and

d) that a DNA sample from that person is needed to determine whether or not it matches the bodily substance found by the police.

Before issuing the warrant, the judge must in addition be satisfied that it would be in the best interests of the administration of justice to require the person to submit to a DNA test. In making that assessment, the judge must consider the nature of the offence committed and all surrounding circumstances, as well as the availability of a peace officer or other person with the proper training and experience to take the DNA sample. A judge who does decide to issue a warrant may set any term or condition that he or she considers advisable to ensure that the warrant is executed in a reasonable manner.

As mentioned earlier, a warrant may be issued only in relation to certain designated *Criminal Code* offences listed in the bill. Over 30 offences currently found in the *Criminal Code* are featured, including:

- offences related to maritime and air safety:
  - **piratical acts** (s. 75)
  - **hijacking** (s. 76)
  - **endangering safety of aircraft or airport** (s. 77)
  - **seizing control of ship or fixed platform** (s. 78.1)
- offences concerning the misuse of dangerous substances or weapons:
  - **using explosives** (s. 81(2)(a))
  - **discharging a firearm with the intent to cause bodily harm** (s. 244)
- offences of a sexual nature:
  - **sexual interference with a person under 14 years** (s. 151)
  - **invitation to sexual touching involving a person under 14 years** (s. 152)
  - **sexual exploitation of a young person** (s. 153)
  - **incest** (s. 155)
  - **offence in relation to juvenile prostitution** (s. 212(4))
  - **sexual assault** (s.271)
  - **sexual assault with a weapon, threats to a third party or causing bodily harm** (s. 272)
  - **aggravated sexual assault** (s. 273)
- other offences against the person:
  - **causing death by criminal negligence** (s. 220)
  - **causing bodily harm by criminal negligence** (s. 221)
  - **murder** (s. 231)

- **manslaughter** (s.236)
- **failure to stop at the scene of an accident** (s. 252)
- **assault** (s. 266)
- **assault with a weapon or causing bodily harm** (s. 267)
- **aggravated assault** (s. 268)
- **unlawfully causing bodily harm** (s. 269)
- **torture** (s. 269.1)
- **assaulting a peace officer** (s. 270(1)(a))
- **kidnapping** (s. 279)
- **hostage taking** (s. 279.1)

- offences in relation to property:

  - **robbery** (s. 344)
  - **breaking and entering with the intent to commit an indictable offence therein** (s. 348(1))
  - **arson, with disregard for human life** (s.433)
  - **arson of own property** (s. 434.1)
  - **mischief (destroying or damaging property) causing actual danger to life** (s. 430(2))

Furthermore, Bill C-104 refers to several offences that existed in previous *Criminal Code* consolidations. Over the years, certain provisions in the *Criminal Code* have been modified to reflect changes in social policy; for example, the crime of "rape" has been replaced with the more expansive concept of "sexual assault." It is, however, a principle of law that a person can be tried and convicted of a criminal offence only under the law in force at the time the offence was committed. In other words, if a person committed an offence in 1968, but is only brought to trial in 1995, he or she can only be charged with the offence as it existed in 1968. (It should be remembered that, in general, there are no limitation periods to bar the prosecution of criminal offences in Canada.) In order to ensure that persons accused of crimes committed many years ago may still be subject to DNA testing today, Bill C-104 extends the application of the warrant provisions to certain *Criminal Code* provisions that have been repealed. The list comprises mostly sexual offences, including sexual intercourse with a stepdaughter, rape, sexual intercourse with a female minor, and sexual intercourse with the feeble-minded.

EXECUTION OF A WARRANT

Prior to taking any action, the police must advise the person against whom the warrant is to be executed of the following:

- the contents of the warrant
- the type of sample to be seized (buccal, blood or hair)
- the purpose of the DNA test
- the possibility that the results of the DNA test may be used in evidence, and
- the authority of the police to use as much force as is necessary to execute the warrant.

Bill C-104 therefore permits the taking of a bodily substance **without** the consent of the suspect. During the execution of the warrant, the suspect may be detained or asked to accompany the police, who must make reasonable efforts must be made by the police to ensure that the privacy of the person is respected.

The fact that a bodily substance can be obtained without the person's consent is not itself problematic. The Supreme Court of Canada has affirmed on several occasions that the taking of an intimately personal substance, such as blood, from an accused without lawful authority *and* without the person's consent will constitute an unreasonable seizure within the meaning of section 8 of the Charter (*R.* v. *Dyment*[7] and *Pohoretsky* v. *The Queen*[8]). Taking a bodily sample in such circumstances is seen as a serious affront to a person's dignity and very integrity. A search of this nature will be permitted, however, if it is authorized by law, if the law itself is reasonable, and if the search is not conducted in an abusive way (*Collins* v. *The Queen*[9] and *R.* v. *Debot*[10]). If properly executed, a warrant issued under Bill C-104

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(7) [1988] 2 S.C.R. 417.

(8) [1987] 1 S.C.R. 945.

(9) [1987] 1 S.C.R. 265.

(10) [1989] 2 S.C.R. 1140.

would likely comply with all three requirements. First, a warrant issued under the guidance of Bill C-104 would clearly be authorized by law. Second, Bill C-104 sets out a reasonable standard that must be followed before a warrant can be issued. (In sum, there must be sufficient evidence to convince a judge that it would be in the best interests of the administration of justice to require the person to submit to a DNA test for certain designated offences. A judge may require police to abide by additional terms or conditions in order to ensure that the warrant is executed in a reasonable manner.) Third, if the police collect the bodily sample in a manner that respects both the dignity and privacy of the person, as the legislation requires, the seizure will be considered reasonable.

SPECIAL PROVISIONS FOR YOUNG OFFENDERS

Bill C-104 explicitly provides that young offenders against whom a warrant is to be executed must be given a reasonable opportunity to consult with legal counsel or a parent. In addition, young offenders are entitled to have legal counsel or a parent present while the warrant is being executed. Young offenders may waive this right, but their waiver must be in writing or recorded on audio/video tape. Officials who appeared on behalf of the Minister of Justice stated that, upon detention, adults against whom a warrant is to be executed also have the right to retain and instruct counsel, as guaranteed by section 10(b) of the Charter. This does not mean, however, that adults are entitled to have a warrant executed in the **presence** of legal counsel; rather, adults are simply entitled to confer with counsel to determine what their legal options might be.

USE AND DESTRUCTION OF SPECIMENS AND RESULTS

A clause in Bill C-104 explicitly states that the bodily substance obtained in the execution of a warrant can be used only for the purposes of forensic DNA analysis in the course of a criminal investigation. Subclause 487.08(2) imposes a similar limitation on the use of the results of the forensic DNA analysis. A few critics found the wording of the subclause to be unclear. In its brief to the Senate Standing Committee, the Canadian Bar Association noted that

this subclause would appear to allow the results of a forensic DNA analysis obtained by a warrant in the investigation of one designated offence to be used in the investigation of any other designated offence where a bodily substance had been found, even in the absence of a warrant. The Canadian Bar Association suggested that the passage of this subclause be delayed until the introduction of legislation pertaining to the banking of DNA evidence. Officials from the Department of Justice discounted this point; they were of the opinion that the police would need to obtain a second warrant in order to compare samples in relation to distinct, separate offences.

Anyone who used a bodily substance or DNA analysis for purposes other than those set out in the bill would be guilty of a summary conviction offence. The maximum penalty for committing such an offence is not great: six months in jail and a $2,000 fine. In its written submission, le Barreau du Québec argued that the unlawful use of genetic information should be more severely punished, with the offence reclassified as indictable and subject to a maximum penalty of 10 years in prison.

Bill C-104 provides for the *immediate* destruction of the bodily substance seized as well as the results of the forensic DNA analysis where there is no match or where the person is acquitted of the designated offence. This does not apply, however, to cases where the person is found not guilty by reason of mental incapacity.

In addition, the DNA sample and results must be destroyed one year after:

- the person is discharged after a preliminary inquiry,
- the charges against the accused are dismissed or withdrawn, or
- the charges against the accused are stayed.

In some circumstances, the evidence need not be destroyed within the prescribed time. A provincial court judge may order that neither the sample nor the results be destroyed within the legislated timeframe if they might reasonably be required in an investigation or prosecution of the person for another designated offence. Le Barreau du Québec and the Canadian Bar Association both argued that, given the threat to an individual's privacy, officials should not be allowed to retain the sample or the results for an indefinite period.

PENDING ISSUES

As mentioned earlier, Bill C-104 deals only with the collection of bodily samples for forensic DNA genotyping. Many other issues are still unresolved, such as:

- **DNA Evidence Bank** - the Minister of Justice indicated that he would be introducing legislation in the fall of 1995 to regulate the storage of DNA profiles. It remains to be seen whether the actual sample, or just the results of the DNA analysis, will be stored. As well, it is still unclear what procedural safeguards will be put in place to ensure that the DNA sample or results collected and stored are used only for criminal investigations.

- **Testing of Convicted Offenders** - Bill C-104 allows for the DNA testing of a person believed to have been a party to certain designated offences. It would appear that the bill is meant to target "suspects or accused" rather than "convicted offenders" but the wording is somewhat vague. An extensive program to establish the DNA profiles of offenders currently incarcerated would undoubtedly face many Charter challenges, including the right against unreasonable seizure protected by section 8 and the right to security of the person as guaranteed by section 7. The government would have to establish that the violation of the privacy interests of the offenders was somehow justified in order to protect societal interests. Since the purpose of forensic DNA genotyping is to identify the assailant, an effort to test only inmates convicted of offences known to have a high recidivism rate might be considered a reasonable compromise.

- **Laboratory Practices** - it is not clear whether the federal government will introduce legislation to govern laboratory practices and procedures for forensic DNA testing. In its consultation paper *Obtaining and Banking DNA Forensic Evidence*, the Department of Justice raised the issue of whether Parliament should legislate accreditation or licensing requirements for laboratories involved in forensic DNA typing.

CONCLUSION

The passage of Bill C-104 was applauded by most commentators and contested by few. Even its most ardent critics would probably agree that the bill strikes an appropriate balance between an individual's right to privacy and the state's duty to detect and prosecute those who commit serious crimes. Legislation to regulate the banking of DNA evidence, to be introduced in the fall of 1995, is likely to spark much more heated debate.